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Case No. 84 - 1000

IN THE SUPREME COURT

OF THE UNITED STATES OF AMERICA

OCTOBER TERM, 1984

DR. KEITH GREAVES, M.D., MEDIC
KEITH HUGHES, DR. ROBERT GREER, M.D.,
SALT LAKE COUNTY, et al.,
PETITIONERS,
-vs-
DANIEL HOWARD BEE,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

TO PETITION FOR WRIT OF CERTIORARI

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DATED: JANUARY 28, 1985

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QUESTION PRESENTED

DID THE APPELLATE COURT BELOW RULE CORRECTLY WHEN IT HELD:

JAIL PHYSICIANS AND JAIL STAFF CANNOT FORCE A COMPETENT PRE-TRIAL DETAINEE TO TAKE DANGEROUS ANTI-PSYCHOTIC MEDICATIONS ON A NON-EMERGENCY BASIS WITHOUT THE CONSENT OF THE DETAINEE AND WITHOUT ANY DUE PROCESS PROTECTIONS.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED.	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES.	iii
STATEMENT OF CASE	2
STATEMENT OF FACTS.	3
REASONS FOR DENYING PETITION . . .	13
POINT I:	
THE DECISION BELOW IS CONSISTENT WITH THE RULINGS OF THIS COURT AND THE RULINGS OF OTHER COURTS OF APPEAL	13
POINT II:	
THE DECISION BELOW AND THE PETITION DO NOT RAISE ANY UNIQUE LEGAL ISSUES.	44
POINT III:	
THE DECISION BELOW IS INTERLOCUTORY AND MAY BE MOOTED ON REMAND.	46
CONCLUSION	49

TABLE OF AUTHORITIES

CONSTITUTIONS

United States Constitution

First Amendment. 14, 21
25, 27

Fourteenth Amendment 27

CASES

A.E. v. Mitchell, 724 F.2d. 864
(10th Cir. 1983). 7, 36
48

Bee v. Greaves, et al, 744 F.2d
1387. . . . . 4, 17
33, 34, 35, 36, 38
40, 41, 43, 48

Bell v. Wolfish, 441 U.S. 520
(1979). 16, 26
27, 28, 29, 30, 31
33, 34, 37, 43, 44

Block v. Rutherford, ___ U.S. ___,
104 S.Ct. 3227, 82 L.Ed.2d 438
(1984). 38

Bowring v. Godwin, 551 F.2d 44
(4th Cir. 1977) 34

Brotherhood of Locomotive Firemen
v. Bangor & Aroostook RR Co.,
389 U.S. 327, 19 L.Ed.2d 560,
88 S.Ct. 437 (1967) 46

Coppinger v. Townsend, 398 F.2d 392
(10th Cir. 1968). 39

Daniels v. Gilbreath, 668 F.2d 477 (10th Cir. 1982). 34

Davis v. Hubbard, 506 F. Supp. 915 (N.D. Ohio 1980). 11, 14 17, 23

Dewell v. Lawson, 489 F.2d 112 (10th Cir. 1976). 34

Estelle v. Gamble, 429 U.S. 97 (1976). 34

Henderson v. Sec. of Corrections, 518 F.2d 694 (10th Cir. 1975) . . . 39

Jones v. Diamond, 636 F.2d 1364 (5th Cir. 1981) 34

Mills v. Rogers, 457 U.S. 291, 102 S.Ct. 2442, 73 L.Ed 2d 16 (1982), opinion in response to certification, 390 Mass. Adv. Sh. 489 (S. Jud. Ct. 1983), on remand, 738 F.2d 1 (1st Cir. 1984) 11, 21 22, 48

Milonas v. Williams, 691 F.2d 931 (10th Cir. 1982). 17

Montanye v. Haymes, 427 U.S. 236, 49 L.Ed.2d 466, 96 S.Ct. 2543 (1976). 19, 20

Rennie v. Klein, 653 F.2d 836 (3d Cir. 1981), vacated and remanded on other grounds, 458 U.S. 1119, 102 S. Ct. 3506, 73 L.Ed.2d 1381 (1982), on remand, 720 F.2d 266 (3d Cir. 1983) 11, 15 23, 40

Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) 14, 15 16

Rogers v. Okin, 478 F. Supp. 1342 (D. Mass. 1979), aff'd in part and rev'd in part, 634 F.2d. 650 (1st Cir. 1980) 15, 21 23, 24

Sconiers v. Jarvis, 458 F.Supp. 37 (1978). 38, 39

Vitek v. Jones, 445 U.S. 480, 63 L.Ed.2d 552 (1980) 15, 18 19, 20, 30, 31, 32

Whalen v. Roe 429 U.S. 589, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977). 14, 15 16

Youngberg v. Romeo, 457 U.S. 307, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1983). 15, 17 18, 40, 42

STATUTES

Utah Code Annotated (1953 as amended)

§64-7-36(10) 7
§64-7-36(10)(c). 36, 48

TREATISES

Davis and Cole, Anti-Psychotic Drugs, Comprehensive Textbook of Psychiatry, Freedman and Kaplan. 10

Physician's Desk Reference, 1978. 10

Plotkin, "Limiting the Therapeutic Orgy: Mental Patients' Rights to Refuse Treatment," 72 Northwestern University Law Review 461 (1977). 10

"Tardive Dyskinesia and Informed Consent," Sooner, et al, March 1978, Psychosomatics 173. 11

Brooks, The Constitutional Right To Refuse Antipsychotic Medications, 8 Bull. Am. Acad. of Psychiatry and Law 179 (1980). 24

A Common Law Remedy For Forcible Medication of the Institutionalized Mentally Ill, 82 Colum. L. Rev. 1720 (1982). 24

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THE RESPONDENT, DANIEL HOWARD BEE, by and through his counsel of record, BRIAN M. BARNARD, of Utah Legal Clinic submits the following BRIEF in Opposition to the Petition for Writ of Certiorari filed by the Defendants-Appellees below.

STATEMENT OF CASE

The Trial Court below, the United States District Court for the District of Utah granted a Summary Judgment for the Petitioners. The United States Court of Appeals for the Tenth Circuit reversed and remanded the matter, finding that there were substantial and material issues of fact, thus the granting of a Summary Judgment was inappropriate.

The mandate has issued; the matter has been remanded to the Trial Court. The matter is proceeding toward trial; a scheduling conference is set for February 12, 1985.

STATEMENT OF FACTS

This matter was presented to the Trial Court on cross motions for Summary Judgment. The Court of Appeals reviewed the Summary Judgment granted to the Defendants-Appellees by the Trial Court. Thus, there are no factual findings in this matter; both Courts considered the record in the light most favorable to the Respondent, resolved all factual ambiguities and disagreements in his favor, and drew all factual inferences in favor of the non-moving party, the Respondent.

Thus, because of the procedural status of the case, the Court of Appeals considered as "fact" certain material that may or may not be determined to be true upon the remand and trial herein. The materials considered as "fact" by the Court of Appeals are considerably

different from the argumentative presentation of the Petitioners (Petitioners' Brief, pp. 3 - 12). The "facts" considered by the Court of Appeals (Bee v. Greaves, et al, 744 F.2d 1387, 1389-1391; Petitioners' Brief, pp. 2A - 12A) are summarized as follows:

Plaintiff Bee was booked into the Salt Lake County Jail on August 9, 1980. Within four days, the jail staff had referred him to the mental health staff because he was hallucinating. On August 15, 1980 Bee complained to the jail staff because he was not receiving Thorazine and threatened to kill himself if the jail refused to give him the drug. The jail placed Bee in isolation, and a jail psychiatrist evaluated him. The jail physician prescribed Thorazine which Bee took voluntarily at that time.

On August 26, 1980, the state criminal court referred Bee to the Utah State Hospital for an evaluation of his competency to stand trial. At the hospital, Dr. Breck Lebegue, M.D. diagnosed Bee as a schizophrenic and prescribed Thorazine for him. The hospital returned Bee to the jail on September 23, and Dr. Lebegue wrote a letter to the state court stating his opinion that Bee was "competent to stand trial at this time in that he has the ability to comprehend the nature of the charges against him and the punishment specified for the offense charged and has the ability to assist his counsel in his defense." The next day the state criminal court declared, after a hearing, that Bee was competent to stand trial. By an unsigned minute entry, the state criminal court "ordered" Bee medicated with Thorazine each evening. The two

jail physicians involved did not medicate Bee on the basis of that minute entry, but instead made their own evaluation and prescribed Thorazine.

Bee has a history of mental illness, however, during the times pertinent to this action, he was never determined to be incompetent nor was he ever committed to any mental institution. He was evaluated at the Utah State Hospital only as part of the criminal proceeding against him.

Under Utah law the mere fact that a person suffers from mental illness is not sufficient to cause their civil commitment; a person must be found, among other things, (a) to pose an immediate danger of physical harm to others or self if allowed to remain at liberty, and (b) to be unable to engage in a rational decision-making process regarding the

acceptance of mental treatment before he can be civilly committed. (Utah Code Annotated §64-7-36(10), 1953 as amended) Once civilly committed, a person may be forcibly medicated against their will; the finding of inability to engage in rational decision making regarding treatment has been determined to be the necessary finding of "incompetence". A.E. v. Mitchell, 724 F.2d. 864 (10th Cir. 1983).

In jail, Bee took Thorazine voluntarily until about October 7, 1980, when he complained that he was having problems with the drug. Beginning October 16, he refused Thorazine treatment for five days. The jail's psychiatrist, Dr. Greer, determined that Bee was "decompensating" as a result of not taking the Thorazine. Dr. Greer has no independent recollection of the incident when the

medication by force was prescribed and made no factual clinical notes as to the incident, the symptoms displayed or the conduct of Bee. Dr. Greer ordered an immediate intramuscular injection of Thorazine. Dr. Greer then ordered Bee forcibly medicated with Thorazine any time that Bee refused to take Thorazine orally.

At that time, Dr. Greer knew the procedure for securing a civil court order to medicate a mentally ill person against their will but declined to pursue that route. (Record on Appeal, Vol. V Greer Deposition, pp. 38-39) Dr. Greer knew he was violating "a law" when he ordered the medication by force without a court order. (Record on Appeal, Vol. V, Greer Deposition, p. 34-35, p. 38-39)

On October 21, a jail medic named Keith Hughes and three (3) other jail

officers administered Bee's Thorazine forcibly by injection with the express purpose of "intimidat[ing] him so he wouldn't refuse the oral medication anymore." When Bee again refused to take the Thorazine on October 23, Hughes and a jail guard threatened Bee with another forcible injection. Confronted with this alternative, Bee acquiesced in an oral dose of Thorazine. The jail staff was trained to and had the authority to involuntarily medicate inmates if so ordered by the jail physicians. (Record on Appeal, Vol III, Depo. of Hughes, p. 45; pp. 49-50) As late as November 11, more than three (3) weeks after Bee's initial refusal, the jail staff remained under a standing order to forcibly medicate Bee if he refused Thorazine orally. Bee took the medicine orally only because of this intimidation.

When the medic Keith Hughes forcibly administered the drug injection to Bee, Hughes testified that Bee was not acting unusual, that he was not "thrashing around, pounding on the tables or anything like that," and that Bee was in an unlocked and open cell or in the common area of the cell block indicating that Bee was not assaultive or out of control.

The immediate side effects of Thorazine are extremely disabling; Thorazine can inflict serious permanent injury. Anti-psychotic drugs have the capacity to severely and even permanently affect an individual's ability to think and communicate. Davis and Cole, Anti-Psychotic Drugs, Comprehensive Textbook of Psychiatry, Freedman and Kaplan, pp. 921-940; Physician's Desk Reference, 1978, p. 1615; Plotkin, "Limiting the Therapeutic Orgy: Mental Patients' Rights

to Refuse Treatment," 72 Northwestern University Law Review, 461 (1977); Sooner, et al, "Tardive Dyskinesia and Informed Consent," March 1978, Psychosomatics 173; Rennie v. Klein, 653 F.2d 836, 843-44 (3d Cir. 1981), vacated and remanded on other grounds, 458 U.S. 1119, 102 S. Ct. 3506, 73 L.Ed.2d 1381 (1982), on remand, 720 F.2d 266 (3d Cir. 1983); Davis v. Hubbard, 506 F. Supp. 915, 927-929 (N.D. Ohio 1980); Mills v. Rogers, 457 U.S. 291, 293, n. 1, 102 S.Ct. 2442, 2445, n. 1, 73 L.Ed.2d 16 (1982); Record on Appeal, Vol. V, Deposition of Greer, pp. 13-15.

The Respondent Bee concedes that forcible medication with anti-psychotic drugs may be required in an emergency in a jail when dealing with a violent detainee.

The Petitioners do not dispute that they forced medication upon Bee against his will, nor do they dispute the possible adverse consequences of the drug. Instead, they asserted that pretrial detainees have no constitutional right to refuse medical treatment; in the alternative, if there is such a right, they asserted the right was outweighed, in this case, by legitimate governmental concerns of the jail staff.

The Court of Appeals found that there were genuine issues of material fact as to:

(a) Whether an emergency existed to justify the forcible medication, and

(b) Whether the forcible medication for an indefinite period was an exaggerated response.

The case was remanded for the Trial Court's consideration of those issues.

REASONS FOR DENYING THE PETITION

POINT I

THE DECISION BELOW IS CONSISTENT WITH THE RULINGS OF THIS COURT AND THE RULINGS OF OTHER COURTS OF APPEAL.

The Decision below is not in conflict with any decision of this Court nor in conflict with any decision of any other Court of Appeal.

The Right to Refuse Treatment

The Petitioners concede that civilly committed mental patients have a constitutional right to refuse anti-psychotic medication. (Petitioners' Brief, p. 13) They claim that there is a variance among

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the Courts that have considered that issue as to the constitutional basis for the right to refuse treatment, but they do not dispute the existence of that right. However, the Petitioners suggest that the concerns and interests requiring the protection of the rights of civilly committed person from forced medication "do not exist in a jail." Reliance upon the civil committment cases however, is appropriate since Bee was a pre-trial detainee.

The basis for the right to refuse treatment is found in the right to privacy, retained liberty interests of institutionalized persons and the First Amendment to the Constitution. Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); Whalen v. Roe, 429 U.S. 589, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977); Davis v. Hubbard, 506 F.Supp. 915

(N.D. Ohio 1980); Youngberg v. Romeo, 457 U.S. 307, 316, 102 S.Ct. 2452, 2458, 73 L.Ed.2d 28 (1982); Vitek v. Jones, 445 U.S. 480 (1980); Rogers v. Okin, 478 F.Supp. 1342, 1366-67 (D. Mass. 1979), aff'd in part and rev'd in part, Rogers v. Okin, 634 F.2d 650 (1st Cir. 1980), vacated and remanded on other grounds sub nom. Mills v. Rogers, 457 U.S. 291, 102 S.Ct. 2442, 73 L.Ed.2d 16 (1982); Rennie v. Klein, 653 F.2d 836 (3rd Cir. 1981), vacated and remanded on other grounds, 458 U.S. 1119, 102 S.Ct. 3506, 73 L.Ed.2d 1381 (1982), on remand, 720 F.2d 266 (3rd Cir. 1983). Those basis apply to pre-trial detainees in a jail.

Fundamental personal rights are protected by the constitutional "right to privacy." Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); Whalen

v. Roe, 429 U.S. 589, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977).

A pre-trial detainee does not have the right to be free of all discomfort; certain discomforts occur and are reasonably incident to pre-trial detention; Bell found such discomforts not to rise to the level of a fundamental liberty interest as protected by Roe v. Wade and Whalen v. Roe. Bell, 441 U.S. at 534; 60 L.Ed.2d 447, at 465. The Decision Below is not concerned with "discomfort" but the substantial and fundamental right not to be forced to take dangerous drugs with severe side effects.

Throughout our legal history, improper invasions of body integrity, including unconsented medical treatment have been recognized as a tort. The determination that that right is "fundamental" comes after an examination of

history and a recognition of the basic values of our society. Historically and based upon the principles of our society, an invasion of one's body by forced medication involves a fundamental right and must be protected by the "right to privacy." Davis v. Hubbard, 506 F.Supp. 915 (N.D. Ohio 1980); Bee at 1392.

A second protected liberty interest is freedom from bodily restraints. This Court held that persons civilly institutionalized by the state retain the right to be free from bodily restraints. Youngberg v. Romeo, 457 U.S. 307, 316, 102 S.Ct. 2452, 2458, 73 L.Ed.2d 28 (1982); see also Milonas v. Williams, 691 F.2d 931 (10th Cir. 1982) holding that juveniles in a detention facilities have the right to be free from physical restraints.

Youngberg also acknowledged that this interest from physical restraints was a right retained by sentenced prisoners. Thus, that right is also retained by pre-trial detainees such as the Respondent. The restraining effects of the drug Thorazine are much more pervasive than the traditional bodily restraints -- manacles and shackles. Through the frightening wonders of modern pharmacology, an injection, more efficiently performs the task of those traditional body restraints by dulling the senses, and controlling the mind and its ability to control the body.

In Vitek this Court acknowledged another liberty interest retained by a sentenced prisoner: the right to be free from arbitrary transfer to a mental institution and involuntary psychiatric treatment. Involuntary treatment

incident to a transfer to a mental institution without appropriate due process protections was determined by this Court to be an unjustified intrusion of personal security. Vitek v. Jones, 445 U.S. 480 (1980) supports the finding of a liberty interest for pre-trial detainees refusing medications.

Changes in conditions of confinement having a substantial impact on a prisoner are not alone sufficient to invoke the protections of due process, so long as the condition or degree of confinement was within the scope of the sentence imposed upon the prisoner. Vitek v. Jones, 445 U.S. 480, 493, 63 L.Ed.2d 552, 565 (1980) citing Montanye v. Haymes, 427 U.S. at 242, 49 L.Ed.2d 466, 96 S.Ct. 2543. Montanye involved a prison transfer from one maximum security facility to another maximum facility; this Court held

that such confinement and such a transfer was clearly contemplated as part of a sentence. This Court in Vitek determined that due process protection applied because the transfer to a mental institution and the involuntary administration of psychiatric treatment was not within the scope of the sentence imposed upon the prisoner.

Both Vitek and Montanye dealt with prisoners and the sentences imposed upon them. Bee is neither a prisoner nor sentenced.

Under Vitek if involuntary mental treatment is not a contemplated part of an inmate's sentence, it cannot be a reasonable contemplated part of pre-trial detention.

Another constitutional basis for the right to refuse forced injection of a mind affecting anti-psychotic drug is the

First Amendment. The First Amendment includes the right to think, the capacity to produce ideas and communicate. Rogers v. Okin, 478 F.Supp. 1342, 1366-67 (D. Mass. 1979), aff'd in part and rev'd in part, Rogers v. Okin, 634 F.2d 650 (1st Cir. 1980), vacated and remanded on other grounds sub nom. Mills v. Rogers, 457 U.S. 291, 102 S.Ct. 2442, 73 L.Ed.2d 16 (1982). The administration of Thorazine devastates the ability of a person to think and to communicate.

In Mills v. Rogers, 457 U.S. 291 (1982), this Court granted certiorari to decide whether "involuntarily committed mental patients have a constitutional right to refuse treatment with antipsychotic drugs", id. at 293, a common form of treatment in the nation's mental institutions. Finding that "both the substantive and procedural issues

[inherent in the right to refuse treatment issue] are intertwined with questions of state law," this Court remanded the case to the First Circuit. Id. at 299, 306. Before doing so, however, this Court identified the relevant procedural and substantive issues:

> The parties agree that the Constitution recognizes a liberty interest in avoiding the unwanted administration of anti-psychotic drugs. Assuming that they are correct in this respect, the substantive issue involves a definition of that protected constitutional interest, as well as identification of the conditions under which competing state interests might outweigh it. The procedural issue concerns the minimum procedures required by the Constitution for determining that the individual's liberty interest actually is outweighed in a particular instance. Id. at 299. [citations omitted].

Lower federal court decisions prior to Mills had recognized, as Mills appears to accept, a liberty interest in avoiding

the unwanted ingestion of anti-psychotic drugs, e.g., Thorazine, Mellaril, Prolixin, and Haldol. Rennie v. Klein, 653 F.2d 836 (3rd Cir. 1981), vacated and remanded on other grounds, 458 U.S. 1119, 102 S. Ct. 3506, 73 L.Ed.2d 1381 (1982), on remand, 720 F.2d 266 (3d Cir. 1983); Davis v. Hubbard, 506 F. Supp. 915 (N.D. Ohio, 1980). That liberty interest is a fundamental one because the forced medication - particularly the forced over-medication - of patients can result in an extraordinary loss of personal autonomy, and can produce severe side-effects, e.g., the loss of motor control associated with tardive dyskinesia. See Rogers v. Okin, 478 F. Supp. 1342, 1359-60 (D. Mass. 1979), aff'd in part and rev'd in part, 634 F.2d. 650, 653 (1st Cir. 1980), remanded sub nom, Mills v. Rogers, 457 U.S. 291, 102 S.Ct. 2442, 73 L.Ed 2d 16

(1982), opinion in response to certification, 390 Mass. Adv. Sh. 489 (S. Jud. Ct. 1983), on remand, 738 F.2d 1 (1st Cir. 1984).

Dangerous Medication

In Rogers v. Okin, 478 F. Supp. at 1360, the Court cited studies indicating that 41% to 56% of chronically hospitalized schizophrenics suffer from tardive dyskinesia a permanent disabling side effect of the use of Thorazine. For a listing of the other severe side-effects that can accompany the use of antipsychotic drugs, see Brooks, The Constitutional Right To Refuse Antipsychotic Medications, 8 Bull. Am. Acad. of Psychiatry and Law 179, 183 (1980); A Common Law Remedy For Forcible Medication of the Institutionalized Mentally Ill, 82 Colum. L. Rev. 1720, 1726-1727 (1982).

There is a right to refuse treatment based upon the right to privacy, liberty interests and the First Amendment of the Constitution. Such a right becomes stronger when the person is threatened with the forcible ingestion of dangerous anti-psychotic medications that may cause severe and permanent harm.

Pre-Trial Detainee Status

The Respondent was, at all times pertinent to this action, a pre-trial detainee awaiting a criminal trial. But for his inability to post bail, he would have been a free man (albeit with a mental illness) walking the streets, awaiting trial.

The rights of an ordinary citizen and the rights retained by a pre-trial detainee include the right to be free

from involuntary treatment for mental illness.

In Bell v. Wolfish, 441 U.S. 520 (1979) this Court upheld certain conditions of confinement in a federal criminal custodial facility against a challenge by pre-trial detainees. In determining whether the conditions were constitutionally permissible as to pre-trial detainees this Court applied two tests. First,

> In evaluating the constitutionality of conditions or restrictions of pretrial detention that implicate only the protection against deprivation of liberty without due process of law, we think that the proper inquiry is whether those conditions amount to punishment of the detainee. For under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law. [emphasis added]

Id. at 535.

The test of whether particular restrictions constitute punishment is

"whether they are rationally related to a legitimate nonpunitive governmental purpose and whether they appear excessive in relation to that purpose." Id. at 561.

Secondly, in addition to the right to be free of punishment, "pretrial detainees, who have not been convicted of any crimes, retain at least those constitutional rights that we have held are enjoyed by convicted prisoners." Id. at 545. Thus, although a particular restriction of a pre-trial detainee may not constitute punishment, it may, nevertheless, be constitutionally impermissible.

Among those rights retained by convicted prisoners (and, hence, by pre-trial detainees) are:

> --"freedoms of speech and religion under the First and Fourteenth Amendments," and,
>
> --"protection of the Due Process Clause to prevent additional

> deprivation of life, liberty, or property without due process of law."

Id. at 545. (citations omitted) Limitations on such rights may be justified only by "legitimate goals and policies of the penal institution." Id. at 546.

Applying those two tests in Bell, this Court upheld certain practices and restrictions of the custodial facility having found the practices and restrictions to be reasonable responses to the "essential" goal of safeguarding security and therefore not violative of the "retained" rights of the pre-trial detainees. Id. at 546, 550-560. The practices and restrictions in Bell did not violate the pre-trial detainees' additional right to be free of punishment since they were not imposed with punitive intent, were rationally related to

permissible nonpunitive governmental purposes, were not shown to be an "exaggerated" response to the "genuine security considerations that actuated" them, and were of only limited duration as applied to pre-trial detainees. Id. at 541, 560-562.

Unlike the restrictions and practices in Bell, the conduct toward the Respondent violated the "retained" rights of even convicted inmates. Thus, although the forcible injection of anti-psychotic drugs and the severe concomitant effects may easily be regarded as punishment, such treatment is unconstitutional regardless of whether it is labelled as "punishment."

The right to be free of involuntary psychiatric treatment was added to the list of constitutional rights retained by convicted inmates enumerated in Bell,

(and, thus, retained by pre-trial detainees), by this Court in Vitek v. Jones, 445 U.S. 480 (1980).

Vitek held that a state may not transfer a convicted inmate to a mental institution without his consent unless certain minimum due process procedures are afforded the inmate. This Court stated:

> A criminal conviction and sentence of imprisonment extinguish an individual's right to freedom from confinement for the term of his sentence, but they do not authorize the state to classify him as mentally ill and to subject him to involuntary psychiatric treatment without affording him additional due process protections. Id. at 493-494.

As in Vitek, the conduct toward the Respondent is qualitatively different from passive jail conditions, as in Bell, that simply interfere with a pre-trial detainee's "understandable desire to be as comfortable as possible during his confinement." 441 U.S. at 534. None of

the restrictions approved in Bell compare in severity to the dangerous conduct toward the Respondent. In Bell there were no physical intrusions into detainees' bodies, no interference with their free thought processes, and no danger of permanent physical disability as a result of the conditions of their confinement. All of those consequences were visited upon the Respondent. These grievous invasions suffered by the Respondent, simply because he could not afford bail, cannot be condoned under the holding in Bell.

The loss of liberty interest by the Respondent was as severe as that imposed on the inmate in Vitek. A major concern in Vitek was the imposition of "compelled treatment in the form of mandatory behavior modification programs," as an infringement of the "'right to be free

from, and to obtain judicial relief for, unjustified intrustions on personal security.'" 445 U.S. at 492. (citation omitted) The Respondent was subjected to a physical intrusion into his body as well as a pervasive, oppressive and inescapable control over the intimate processes of his mind. The Petitioners claim the right to circumvent the import of the Vitek decision by inflicting involuntary psychiatric treatment on detainees in a custodial facility rather than a mental institution. As discussed below, none of the goals of a custodial facility justify the Petitioners' failure to afford the Respondent due process before imposing unwanted and dangerous psychiatric treatment.

Legitimate Non-Punitive Governmental Purposes

The Court of Appeals scrupulously following the Bell decision ruled that if the forced medication of the Respondent served a legitimate non-punitive governmental purpose and the Petitioners were not exaggerated in their response, that the Respondent could be medicated against his will. Absent such legitimate governmental objectives the Court suggested that involuntary medication may itself amount to unconstitutional punishment. Bee, 744 F.2d 1387, 1395.

The Court of Appeals then reviewed the three governmental purposes suggested by the Petitioners as justifying the forced medication: (a) the right and duty of a jail to provide adequate medical care to a mentally ill detainee, (b) the interest in maintaining a detainee competent to stand trial, and (c) jail

security, efficiency and safety. The Court of Appeals stated:

> Each of these asserted interests must be judged in light of the . . . admonitions in Wolfish.

Bee v. Greaves, 744 F.2d 1387, 1394.

In response to the first claimed jail interest, the Decision Below held that there was no legitimate governmental interest in providing a pre-trial detainee medication against his will. Bee, 744 F.2d at 1395. A jail has an obligation to provide adequate medical care including mental health care, to an inmate or a pre-trial detainee. Estelle v. Gamble, 429 U.S. 97 (1976); Dewell v. Lawson, 489 F.2d 112 (10th Cir. 1976); Daniels v. Gilbreath, 668 F.2d 477 (10th Cir. 1982); Jones v. Diamond, 636 F.2d 1364, 1378 (5th Cir. 1981); Bowring v. Godwin, 551 F.2d 44, 47 (4th Cir. 1977). That obligation applies only when the

care is needed and wanted by the inmate. Thus, the Decision Below properly held that such a duty "can not be turned on its head" to allow a jail to force medications upon an inmate who did not want or seek care. Petitioners cite no cases to the contrary.

The Decision Below correctly determined that there was no legitimate governmental interest in maintaining the competency of a pre-trial detainee who had been determined by the criminal court to be competent. Bee, 744 F.2d at 1395. The Decision Below also properly held that a decision to medicate a pre-trial detainee should be based upon the legitimate treatment needs of the individual and medical judgment, and not upon the requirements or needs of a prosecutor. Petitioners cite no cases to the contrary.

Another basis for holding that neither of these two claimed jail interests justified the forced medication, the Decision Below noted the Utah civil committment laws. Under Utah law a mentally ill person has the right not to be subjected to involuntary mental treatment absent a hearing which reviews the person's competency. Utah Code Ann. §64-7-36(10)(c) (1953 as amended); Bee, 744 F.2d at 1395; A.E. v. Mitchell, 724 F.2d 864, 867-68 (10th Cir. 1983). Thus, application of these two claimed state interests for forced medication directly violates Utah statutes.

Contrary to Petitioners' claim regarding a governmental interest in the "orderly and efficient management" of a jail (Petitioners' Brief, p. 27, p. 29), the efficient operation of any governmental entity must never be a sufficient

interest to over-ride the civil rights or liberty interests of inmates or pre-trial detainees!

The Petitioners suggest that forced medication is within the contemplated scope of pre-trial confinement; they cite no authority for that proposition. "Privacy" is lost as an incident of pre-trial detention. (Petitioners' Brief, p. 20; Bell, U.S. at 537, L.Ed.2d at 467) The reference in Bell is not to the constitutionally protected "right to privacy" as the Petitioners suggest, but to the common meaning: communal living and the non-private existence of a person in a crowded and supervised jail. The ruling in Bell sets forth what restrictions could be reasonably contemplated as part of pre-trial confinement; forced medication is not a reasonably contemplated

restrictions on a pre-trial detainee's liberty.

The final claimed governmental interest, jail security and safety was considered in the Decision Below. This is a serious and legitimate governmental concern. Block v. Rutherford, ___ U.S. ___, 104 S.Ct. 3227, 82 L.Ed.2d 438 (1984) The Respondent concedes that forcible medication with anti-psychotic drugs may be required in an emergency for jail safety and security. The Decision Below held that absent an emergency the forcible medication is not "reasonably related" to the legitimate governmental goal of jail safety and security. Bee, 744 F.2d 1387, 1395.

Petitioners cite Sconiers v. Jarvis, 458 F.Supp. 37 (1978) for the proposition that an inmate may be forced to take anti-psychotic medication against his

will. In Sconiers the Trial Court found a valid determination by two physicians that a medical emergency existed. In the Decision Below, the case was remanded for a factual consideration as to whether a medical emergency existed. Sconiers is in full accord with the decision and ruling of the Decision Below.

Henderson v. Sec. of Corrections, 518 F.2d 694 (10th Cir. 1975); Coppinger v. Townsend, 398 F.2d 392 (10th Cir. 1968) cited by Petitioners are not relevant. Those cases involve prisoners, and involve a choice of treatment or "second guessing" a physician rather than choosing to have treatment or not. These case are not pertinent to the right to refuse dangerous medical treatment, the issue considered in the Decision Below.

Following Youngberg the Decision Below holds that in an emergency situation, the decision to forcibly medicate

> requires a professional judgment call that includes a balancing of the jail's concerns for the safety of its occupants against a detainee's interest in freedom from unwanted antipsychotics. Any decision to administer antipsychotic drugs forcibly must be the product of professional judgment by appropriate medical authorities, applying accepted medical standards. Cf. Youngberg v. Romeo, 457 U.S. 307, 321-23, 102 S.Ct. 2452, 2461-62, 73 L.Ed.2d 28 (1983); Rennie v. Klein, 720 F.2d 266, 269 (3rd Cir. 1983) It requires an evaluation in each case of all the relevant circumstances, including the nature and gravity of the safety threat, the characteristics of the individual involved, and the likely effects of particular drugs.

Bee, 744 F.2d at 1395-6.

The Decision Below holds that there should be a medical judgment in deciding to forcibly medicate in an emergency, and defers to the medical profession. The Decision Below did not, as the Petitioners wrongly suggest Youngberg requires,

totally defer to a medical judgment to forcibly medicate in a non-emergency situation without the benefits of due process or a civil committment.

The Decision Below held that because of the possible permanent and severe effects of Thorazine, an indefinite order directing forced medication is not a reasonable response, if there exist less drastic means for achieving the same basic purpose. Thus, less restrictive alternatives, such as segregation or the use of less controversial drugs like tranquilizers or sedatives should be ruled out before resorting to anti-psychotic drugs even in an emergency. Bee, 744 F.2d 1387, 1395. See Rogers v. Okin, 478 F. Supp. 1342, 1359-60 (D. Mass. 1979), aff'd in part and rev'd in part, 634 F.2d. 650, 653 (1st Cir. 1980), remanded sub nom, Mills v. Rogers, 457

U.S. 291, 102 S.Ct. 2442, 73 L.Ed 2d 16 (1982), opinion in response to certification, 390 Mass. Adv. Sh. 489 (S. Jud. Ct. 1983) (holding that, absent court approval, a mental institution may treat a nonconsenting mental patient with anti-psychotic drugs only if the patient poses an imminent threat to himself of others and no less intrusive method of treatment is available); on remand, 738 F.2d 1 (1st Cir. 1984).

The holding of the Decision Below that less drastic alternatives should be explored before forced medication was distinguished from the rejection in Youngberg of the "less intrusive means" analysis. Youngberg, 457 U.S. at 322-24, 102 S.Ct. at 2462-63. Youngberg involved temporary physical restraints rather than mental restraints with potentially permanent effects, and involved an

institutionalized person unable to care for himself. The Petitioners herein are required by their own jail regulations to consider less intrusive means. Maintaining order and security in the jail and protecting safety can usually and reasonable be obtained without forced medication. The Decision Below recited

> [W]e believe the state is required to consider less restrictive alternatives. Cf. Wolfish, 441 U.S. at 574, 99 S.Ct. at 1892 (Marshall, J., dissenting) ("There is no basis for relaxing this [less restrictive alternatives] requirement when the rights of presumptively innocent detainees are implicated.") Indeed, the jail regulations of the detention center in this case specifically suggest segregation as the appropriate measure when mentally ill patients "upset or provoke" other inmates. [citation omitted] The jail regulations also contemplate that commitment "shall be considered for inmates with moderate to severe mental problems." [citation omitted]

Bee, 744 F.2d 1387, 1396 n. 7.

Thus, the Court of Appeals properly applied the decision of this Court in

Bell to the case at bar and reviewed the treatment of a pre-trial detainee under the standards set forth in Bell.

The Court of Appeals remanded the matter and directed the Trial Court to determine under the Bell criteria whether there was a legitimate governmental need justifying the Petitioners' conduct and whether the response of the Petitioners to that need was excessive or exaggerated.

POINT II

THE DECISION BELOW AND THE PETITION DO NOT RAISE ANY UNIQUE LEGAL ISSUES.

The decision of the Court of Appeals does not raise any significant nor unique legal issues. There is no special or important reason for review of that

decision on a writ of certiorari by this Court.

The Petitioners, as would most Petitioners, suggest that this case involves an important issue, that the law regarding the issue is unsettled and there is a conflict between analogous decisions made by various Courts of Appeal, and therefore a Writ of Certiorari should be granted.

This case does involve an important issue, but as discussed above that issue was properly dealt with by the Court of Appeals below in conformance with the guidance of the rulings of this Court.

The Petitioners admit that the propriety of forcibly medicating mentally ill but competent pre-trial detainees has never been considered by this Court, nor has it been considered by any federal courts except in this case. (Petitioners'

Brief, p. 12) Therefore, the case law regarding this issue is neither unsettled nor in conflict.

Although this case involves an important issue, there is not sufficient conflict nor lack of consistency in reported decisions on the issue to warrant the intervention and supervision of this Court.

POINT III

THE DECISION BELOW IS INTERLOCUTORY AND MAY BE MOOTED ON REMAND.

This matter has not been tried or resolved on its facts. Essential "facts" of this case are still in dispute. The resolution of those facts may moot the concerns of the Petitioners. Therefore, the question presented is not ripe for consideration; this case is not ready for review by this Court. Brotherhood of Locomotive Firemen v. Bangor & Aroostook

Railroad Co., 389 U.S. 327, 19 L.Ed.2d 560, 88 S.Ct. 437 (1967).

The Trial Court below granted a Summary Judgment for the Petitioners herein. The Court of Appeals reversed and remanded the matter finding that there were substantial issues of fact, thus a Summary Judgment was inappropriate.

The mandate has issued and the matter remanded. The case is proceeding toward trial; a scheduling conference is set for February 12, 1985.

A final factual determination that there was an emergency and that the jail staff responded appropriately will moot the claims and concerns of the Petitioners. Until such time as there is such a final factual determination, this case should not be considered by this Court.

There is a significant state created liberty interest which shall be raised on remand that may be dispositive of this case. Under Utah law a mentally ill person has the right not to be subjected to involuntary mental treatment absent a hearing which determines the person's competency. Utah Code Ann. §64-7-36(10)(c) (1953 as amended); Bee, 744 F.2d at 1395; A.E. v. Mitchell, 724 F.2d 864, 867-68 (10th Cir. 1983). Thus, forced psychiatric treatment of any one without the due process protections of a committment proceeding is contrary to Utah statute. That state created liberty interest may resolve this case; that issue should be considered by the Trial Court as was directed in Mills v. Rogers, 457 U.S. 291 (1982).

CONCLUSION

For the reasons stated herein, the Respondent, Daniel Howard Bee requests this Honorable Court to deny the Defendant-Appellees' Petition for a Writ of Certiorari and to allow this matter to proceed to trial in the United States District Court for the District of Utah for a final factual determination and resolution.

RESPECTFULLY SUBMITTED,

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